adverted to. But it appears that their interests were not antagonistic. Under the statute, 40 U. S. STAT. AT LARGE, Ch. 25, Sec. 12, all moneys received by the railroads during federal control became the property of the United States, and all operating disbursements, such as damages to be paid for injuries to property, were payable out of such moneys. Hence, when the insurance company paid the loss on the float the money went to the United States, and if the company were to be reimbursed as subrogee on its claim against the New York Central Railroad, the reimbursement would have to come out of money belonging to the United States. The United States, therefore, would in substance be required to pay back to the insurance company, by way of damages, the money which it had received from the insurance company by way of indemnity. The question is, therefore, much more than one of adversary parties. It raises the very substantial point as to whether the insurance company was subrogated to any rights against the insured, because of the latter's fault in connection with the loss. On this point the law is clear. If the property is damaged by the tortious act of the insured or its agents or servants, the insurer, if liable under its contract, has no right of subrogation. *Phoenix Ins. Co.* v. *Erie Transportation Co.*, (1885), 117 U. S. 312. In *Simpson* v. *Thompson,* (1877), 3 App. Cas. 279, it was held by the House of Lords that where two ships, the property of the same owner, collide, and the underwriters pay the loss, they have no right of action against the owner of the ship that did the mischief, as he himself had no right, inasmuch as, being the owner of both vessels, any right he had must be a right of action against himself, which is an absurdity and a thing unknown to the law. To the same effect, see *Globe Ins. Co.* v. *Sherlock,* (1874), 25 Ohio St. 50, 68.

In the case under review, therefore, the United States Circuit Court of Appeals appears to have come to the only possible decision, and the weakness in the plaintiff's case was not due to a technical rule as to parties but to the fact that the federal statute, by consolidating all the railroads under the unified operation and control of the United States, subjected all insurers of railroad property to the additional burden of being deprived of any recourse through subrogation for injuries caused by the tortious operation of any other railroad property. Congress might have expressly saved such right of recourse by authorizing actions by insurers in all cases where such right of action would have existed prior to federal control, but it did not do so. The plaintiff may, therefore, properly consider the loss of its right of subrogation one of the burdens chargeable to the war. E. R. S.

EVIDENCE—CONSTITUTIONAL LAW—SEARCHES AND SEIZURES.—The opinion of the Supreme Court of the United States in *Gouled* v. *United States,* 41 Sup. Ct. 261, suggests this further examination of the leading cases in that court for the discovery of the status of the rule as to the admissibility of evidence secured through violation of the Fourth Amendment against unlawful searches and seizures. The opinion in *Adams* v. *New York,* 192 U. S. 585, following the much earlier case of *Boyd* v. *United States,* 116 U. S. 616,

left the profession in serious doubt as to whether, in cases where evidence was procured through violation of this Fourth Amendment, there was still opportunity for the application of the doctrine that illegality in procuring it does not go to admissibility of evidence.

In *Boyd's* case the production of evidence was coerced through an order of court based upon an unconstitutional statute, and against an appropriate objection of defendant, was admitted. The Supreme Court held that the proceeding violated both the Fourth and the Fifth Amendments. In the *Adams* case a search warrant was issued to find gambling paraphernalia, and in the execution of it certain private papers of the defendant, not covered by the warrant, were taken. So far as the opinion discloses, the question first came to the court upon the objection of the defendant to the admission in evidence of the papers so taken. In the Supreme Court it was held that the evidence was correctly admitted; that the principle that illegality in securing evidence does not go to its admissibility was controlling.

The question was again before the Supreme Court in the case of *Weeks* v. *United States,* 232 U. S. 383. Weeks was indicted for misuse of the mails in the carrying on of a lottery. In his absence from home, officers, acting without warrant, entered defendant's house and carried away certain private papers of his there found. Before trial he petitioned the court for an order directing the return of the papers so taken. The petition was granted as to all seized which were not material as evidence upon the trial, but as to such it was denied. The papers retained were admitted in evidence upon the trial against the objection of the defendant that his constitutional rights were violated in their seizure and use as evidence. It is held by the Supreme Court that the evidence was inadmissible because secured through an unlawful seizure, and because, upon petition before trial, which was made, its restoration should have been ordered. The principal reliance is the *Boyd* case. The *Adams* case is distinguished upon the ground that in that case no antecedent petition for return was made.

The *Silverthorne Lumber Co.* case (251 U. S. 385) followed. An officer, armed only with a subpoena *duces tecum,* seized certain private papers of a corporation. "As soon as might be," application was made to the court for the return of the papers seized. They were returned, but not till copies and photographs of them had been taken and a new indictment framed upon the basis of the information so gained. A new subpoena *duces tecum* was taken out and served, requiring the production on the trial of the original papers. The officers of the corporation served refused to produce them. The court then made a special order for their production, which was disobeyed, and contempt proceedings instituted, which were reviewed in the Supreme Court. It was held that the principle applied in the *Weeks* case forbids not alone the use upon the trial of the evidence gained through a violation of the Fourth Amendment, but *any* use of it for any purpose.

Now follows the case first mentioned, the *Gouled* case. Here certain private papers were taken by government officers by stealth and without warrant of any kind, and offered in evidence upon the trial of defendant

and admitted against his objection that they were seized in contravention of his privilege against unreasonable searches and seizures, and were being used in violation of his privilege against self-crimination. The Supreme Court sustained both objections and excused the failure to make application before trial for the return of the papers on the ground that the first notice of the taking came to defendant when they were offered in evidence. Other papers were taken while officers were executing search warrants. As to this latter taking, it is held that since the papers seized had only evidential value, their taking was an unlawful seizure; that a search warrant cannot be used to justify the entering of one's premises *for the purpose only of searching for evidence of crime, and of seizing it if found;* that such is not the office of the search warrant. In the language of the court,

> "they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public, or the complainant, may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."

A very elastic statement. What is that "interest which the public may have in property" which will justify a warrant? What is the condition "when a valid exercise of the police power" renders "possession by the accused unlawful"? Is it a wholly irrational interpretation of the language of the court to say that the public has a very real interest in the discovery, seizure and use of everything which may tend to establish guilt of crime?

Reference might be here made to the case of *Amos* v. *United States,* 41 Sup. Ct. 266, involving the unlawful seizure of whisky, and which was decided at the same time and upon the authority of the *Gouled* case.

The court has not yet said that the fact alone that evidentiary materials have been unlawfully seized in violation of the Fourth Amendment will defeat the use of such materials in evidence. It has not yet said that if evidentiary materials are seized in violation of the Fourth Amendment, and the person from whom they are seized, having knowledge of the seizure, fails to take any step for their return before they are offered in evidence, that his objection to their use in evidence as in violation of his right, under either the Fourth or the Fifth Amendment, will be good. Indeed, the exact contrary is held in the *Adams* case. The court still seems to consider the *Adams* opinion as correctly stating the law. At least the court has never purported to overrule it, unless by inference in a paragraph in the *Gouled* opinon, to be referred to later. The court in the *Adams* opinion discusses the *Boyd* case and attempts to show that it does not rule the state of facts presented in the *Adams* case, and yet the evidence allowed in that case was unlawfully seized. The *Weeks* opinion distinguishes the *Adams* case as being one where the court was first called upon to consider the effect of unlawfulness of the seizure at the time it was offered upon the trial, and holds that the court will not try the question of lawfulness upon the trial. The opinion in the *Silverthorne Lumber Co.* case states that the principle of

the *Adams* case is not applicable to the state of facts then before it, presumptively because the question was raised in an ancillary proceeding and not during the progress of the trial. In the *Gouled* case the court holds that the fact that the defendant did not know of the unlawful seizure till the evidence was offered on the trial excused him from raising the question in some ancillary proceeding, which in the *Weeks* case seems to have been regarded as necessary.

But the cure for all our troubles over this question lies in the rule announced in the latter part of the opinion in the *Gouled* case. The court is discussing the application of the rule, or alleged rule, that illegality in securing evidence does not affect its admissibility. The court says:

> "We think, * * * that it is a rule to be used to secure the ends of justice under the circumstances of each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed, for any technical reason, to prevail over a constitutional right."

Verily, the line between what is legal and what is equitable is being lost in a not too unwelcome haze. The world moves and the legal section of it is catching on. It matters little what was said in Doe's or Roe's case. It matters not so much "what is the rule"; the concern rather is "what does the cause of justice call for." There is little danger yet, however, that the boast that ours is a government by law will become an idle one.

V. H. L.

THE USEFULNESS OF INTERVENTION AS A REMEDY IN ATTACHMENT.—While rules of procedure are not saved from the rude hand of the reformer by the "due process" guarantees of our constitutions, they do rest, nevertheless, under the very efficient protection of professional conservatism. Such rules are looked upon by the bench and bar as their own special concern, and innovations in this field must maintain the burden of proving their character before both the lawyer members of the legislature and the lawyers and judges who interpret them in the course of litigation. It would be natural, therefore, to expect that a proposed reform in procedure would have to meet at least the possibility of two shrinking processes, one at the hands of the legislature and the other at the hands of the court. An interesting case of the latter kind is found in *Chase* v. *Washtenaw Circuit Judge,* (Mich., 1921), 183 N. W. 63.

In that case the petitioner, who claimed that her property had been wrongfully attached as the property of another sought to intervene in the attachment suit for the purpose of freeing it from the lien of the wrongful levy. The Michigan statute passed in 1915 (C. L. 1915, Sec. 12362) allowed an intervention in any action by anyone claiming an interest in the litiga-